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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958

No. 905

DONALD PATRICK McINTYRE,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Donald Patrick McIntyre, petitioner, prays that a Writ of Certiorari issue from this Court to review a judgment of the Supreme Court of the State of Illinois entered on November 26, 1958. A Petition for Rehearing was denied on January 22, 1959, and the judgment of the Supreme Court of Illinois became final. On the 4th day of February, A. D. 1959, the Honorable Walter V. Schaefer, a Justice of the Supreme Court of Illinois, entered an Order staying the mandate until disposal of the Petition for Writ of Certiorari from the Supreme Court of the United States.

CITATION TO OPINION BELOW.

The judgment of the Supreme Court of Illinois, subject to this Petition for Writ of Certiorari (R. 5-6) is reported in 15 Ill. 2d 350, 155 N.E. 2d 45. The opinion is included here as Appendix A.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, U.S.C.A., Section 1257(3).

The judgment of the Supreme Court of Illinois became final on denial of rehearing on January 22, 1959. On April 22, 1959 Mr. Justice Clark extended the time for filing the Petition for Writ of Certiorari to and including May 12, 1959.

QUESTIONS PRESENTED.

1. Whether Petitioner was denied due process of law within the perview of the Fourteenth Amendment to the Constitution of the United States where his search was made and his property seized by police officers by virtue of an illegal and void search warrant.

2. Where entry is made to Petitioner's place of business by police officers under the direction of a void search warrant, whether the arrest of the Petitioner and the search of his premises and the seizure of property there found is valid merely because the arresting officer found the defendant in the process of violating a law after having made the entry by virtue of the void search warrant.

3. Whether the Petitioner was denied due process of law in the Supreme Court of the State of Illinois when, by its judgment, the Court declared that the property seized from the Petitioner was an incident to his arrest, regardless of whether the search warrant authorizing the arresting officer's entry to Petitioner's premises was in proper form.

STATEMENT.

On September 24, 1957, the State's Attorney of Lee County, Illinois, filed a Criminal Information (R. 3*) charging that the Petitioner did, on August 16, 1957, in the County of Lee and State of Illinois, wilfully keep a room in the building located at 316 First Street in the City of Dixon, County of Lee and State of Illinois, and in said room kept a book for the purpose of recording and registering bets on the result of the speed of a horse, contrary to the statutes of the State of Illinois.

All of the evidence introduced against the Petitioner on the trial of the said information was seized from the premises on which the Petitioner was found by virtue of a search warrant issued by a Justice of the Peace, Edwin W. Merrick, on the complaint of a State officer, Robert L. Bales.

This complaint charged that the premises at 316 First Street, in the City of Dixon, Illinois, "was known as Lloyd's Tap, and that it is a place resorted to for the purpose of unlawful gaming and gambling." The affiant

* The Trial Court record printed for use in the Supreme Court of Illinois is on page 3 of the Record transmitted to this court. References to this part of the Record are in this form: (R. 3-).

further stated that he "verily believes" that certain gambling impliments, such as racing scratch sheets, racing forms and a register of bets on horse races are concealed in the basement rooms directly beneath the premises known as Lloyd's Tap. His reasons for the said beliefs are that he was in and about the basement of the premises and personally viewed and observed the said racing forms, scratch sheets and register of bets on horse races. No date when the aforesaid officer saw the alleged violation upon which his reasons for the aforesaid beliefs were based, appears in his complaint for a search warrant (R. 89).

A search warrant issued by the aforesaid Justice of the Peace upon the complaint addressed to the Sheriff, Coroner or Constable of Lee County, commanding him to enter the premises of Lloyd's Tap and the basement located directly beneath the said premises at 316 First Street, and to search for gaming apparatus and impliments escribed in the complaint, and to bring them, and the person in whose possession they are found, before Edwin W. Merrick, Justice of the Peace. The search warrant authorized one Earl Kelchner to execute the same (R. 10, 11).

Mr. Kelchner's return appearing on the search warrant reported that he seized four sheets of recorded bets with the names of horses and initials of bettors thereon, seven scratch sheets dated August 16, 1957, $511.00 in currency and other property such as magazines, a racing manual, telephones and a clock. The return also stated that he arrested the Petitioner (R. 11, 12).

A motion was made to quash the search warrant and to suppress the evidence. The principle grounds for the said motion were that the affidavit upon which the search warrant issued was is insufficient and was based on belief which is uncertain and does not state facts charging any

violation of the criminal law, and that the affidavit did not set forth facts establishing *the grounds for* the application for probable cause and that before the issuing of the same the affiant thereto was not examined under oath (R. 5.); Petitioner further claimed that the said complaint did not set forth sufficient facts showing that the criminal law of the State of Illinois had been violated (R. 7).

The Trial Court denied the Petitioner's motion to quash the search warrant and to suppress the evidence (R. 12).

The defendant waived a trial by jury (R. 12). The Court found him guilty and sentenced him to the County Jail of Lee County for a period of thirty days and fined him $1,000.00 (R. 12, 13).

All of the papers and property seized were introduced in evidence over the objection of the Petitioner's counsel. The Complainant in the affidavit for the search warrant, Robert L. Bales, testified that Justice of the Peace Merrick had the complaint for the search warrant "all made out before he got there" (R. 37).

At the time of the actual search, the Petitioner was not arrested. The aforesaid Earl Kelchner, who led the raid on August 16, testified that he went into the building at 316 First Street and then into the basement. He immediately "proceeded to read the search warrant to the defendant" and then seized the articles produced in Court (R. 15). The Petitioner was not then arrested. Officer Kelchner further testified that at the time he confiscated the various items, "I arrested Mr. McIntyre and took him in the squad car to the police station" (R. 21).

With reference to whether or not Earl Kelchner saw the commission of a crime by the Petitioner, this was disclosed in his cross examination where he testified (R. 22):

"Robert Bales had money in his hand and was in the process of placing a bet. He was giving it to Mr. McIntyre. *I don't know if Mr. McIntyre had taken it. I did not hear them say anything. I didn't hear Bales say anything. I didn't hear McIntyre say he was going to receive the money or not.* Bales was acting as a detective.

"Q. You saw nothing illegal going on so far as you were concerned when you went in there.

"A. They were reading these forms. *That is all I saw. Then I read the search warrant.*"

Notwithstanding the foregoing uncontradicted testimony of Mr. Kelchner, the Supreme Court of Illinois stated that Officer Kelchner "saw Bales in the process of making a bet with defendant." He then confiscated the various items and arrested the defendant. The Supreme Court of Illinois further found:

"It is apparent from the testimony that when the police chief entered the premises the criminal offense of keeping a book for the registration of bets was being committed in his presence. He therefore had a right to arrest defendant without a warrant and, having arrested him, had a right to search the immediate premises and the defendant's person and seize any evidence which was found on that search.

"Since the articles in question were properly obtained as an incident to defendant's arrest it follows that they were properly admitted in evidence, regardless of whether the search warrant was in proper form. The judgment of the county court of Lee County is therefore affirmed."

REASONS FOR GRANTING THE WRIT.

The case here made by the Petitioner presents the proper occasion for this Court to review the recurring Constitutional question whether the rights of a defendant have been violated within the due process clause of the Fourteenth Amendment to the Constitution of the United States, where a State Court approves the seizure of a defendant's property after an entry is made to the premises by a void search warrant.

The basis for the belief of the complainant in the complaint for a search warrant appears therein in the following language:

> "That the following are the reasons for said belief: that the said Robert L. Bales was in and about the basement of said premises and personally viewed and observed the racing forms, racing scratch sheets, register of bets on horse races and monies bet on horse races."

No date when the complainant, Mr. Bales, was in the basement premises appears in the complaint or affidavit and the absence thereof renders the search warrant void.

Article II, Section 6 of the Illinois Constitution of 1870 provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized."

This provision is substantially the same as that contained in the Fourth Amendment to the Constitution of the United States.

It seems to be universally held that where an affidavit is silent as to the date when affiant or complainant saw the commission of the crime, as the basis for his statement that contraband is on certain premises, no probable cause exists for the issuance of a search warrant in pursuance of such defective affidavit or complaint. This date is of extreme importance because unless it is set forth in the affidavit, no court can determine whether the affiant or complainant saw the commission of the crime described so far in the past that it would be unreasonable to conclude that the contraband is on the premises sought to be searched, or on or about the date when the affidavit is made.

In *Staker* v. *United States*, 5 F. 2d 312, 314, it is stated:

> "Furthermore, although in fact the affidavit was made immediately after the facts were discovered, the affidavit itself is silent as to the time element. So far as the affidavit shows, the officer might have smelled the fumes months before the affidavit was made."

In *Kohler* v. *United States*, 9 F. 2d 23, 24, the Court stated:

> "The defects in Donnelly's affidavit are glaring. The spaces for the day and the month are not filled in . . ."

Similarly, in *Poldo* v. *United States*, 55 F. 2d 866, 868, the Court observed:

> "The affidavit of Geaque does not disclose the date on which his observations were made. Time of the

affidavit's observations, which are set forth as constituting probable cause that a crime has been committed, is of the essence of the affidavit. *Dandrea* v. *United States* (C.C.A. 8) 7 F. (2d) 861, 864."

The Supreme Court of Illinois avoided any analysis of the complaint for search warrant and for a search warrant that issued in pursuance thereof, and held:

> "It is apparent from the testimony that when the police chief entered the premises the criminal offense of keeping a book for the registration of bets was being committed in his presence. He therefore had a right to arrest defendant without a warrant and, having arrested him, had a right to search the immediate premises and the defendant's person and seize any evidence which was found on that search.
>
> "Since the articles in question were properly obtained as an incident to defendant's arrest it follows that they were properly admitted in evidence, regardless of whether the search warrant was in proper form. The judgment of the county court of Lee County is therefore affirmed."

In the case of *Weeks* v. *United States*, 232 U.S. 383, it was held that evidence seized under an illegal entry was inadmissible in a prosecution for violation of a Federal law in a Court of the United States because it was there deemed to be an infraction of the Fourth Amendment to the Constitution of the United States.

In the case of *Wolf* v. *Colorado*, 338 U.S. 25, this Court stated:

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty'

and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

"Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution."

The case of *Wolf* v. *Colorado* was before this Court on a Petition for a Writ of Certiorari to the Supreme Court of Colorado. It was pointed out at page 26 of this case that the Supreme Court of Colorado has sustained convictions in which such evidence was admitted.

Notwithstanding the foregoing excerpt, in which this Court held that it has no hesitation in holding that where a State affirmatively sanctioned illegal incursion into privacy, it would run counter to the guarantee of the Fourteenth Amendment, this Honorable Court held (page 33) that in the prosecution in a State Court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.

This conclusion was arrived at after an analysis of the States which have rejected the Weeks doctrine and those which have accepted and followed that doctrine, and it appears that the foregoing conclusion of this Court must be deemed applicable only to those states which have rejected the Weeks doctrine and have left the victim of police trespass to a suit for damages. As pointed out by this Court at page 6 of its Opinion, the State of Illinois, after two cases following the former State Rule, followed the Federal Rule as announced in the *Weeks* case, in *People* v. *Castree*, 311 Ill. 392, 143 N.E. 112.

The State of Colorado rejected the rule in the *Weeks* case in the decision of the Supreme Court in *Massantonio* v. *People*, 77 Colo. 392, 236 P. 1019. This Court concludes its opinion with the statement, "Problems of a converse character, also not before us, would be presented, should Congress, under Section 5 of the Fourteenth Amendment, undertake to enforce the rights there guaranteed by attempting to make the Weeks doctrine binding upon the States."

It seems that the acceptance by the State of Illinois of the rule announced in the *Weeks* case, which would exclude evidence illegally attained, is the equivalent of legislation by Congress which would make the Weeks doctrine binding upon the States.

The reasoning of this Court seems to support the foregoing argument because at page 30 of this Court states, "Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found." The State of Illinois does not rely upon other effective methods of deterring unreasonable searches, and, therefore, this

nonaction by the State of Illinois cannot be deemed to be equally effective as remedies of private action or the internal discipline of the police, under the eyes of an alert public opinion.

It would seem that from the reasoning in the case of *Wolf* v. *Colorado* that it is the Supreme Court decision that has offended the Constitutional rights of the Petitioner under the due process clause of the Fourteenth Amendment to the United States Constitution. The decision of the Supreme Court of Illinois permitted the admission into evidence of the articles seized by the police during an illegal trespass by the simple formula of avoiding any discussion of the validity of the search warrant under which authority the police officer made his entry. This action of the Supreme Court of Illinois calls for determination by this Honorable Court as to whether the Petitioner has been deprived of his liberty where his property has been seized contrary to the due process clause of the Fourteenth Amendment to the United States Constitution.

In *Frank* v. *Mangum*, 237 U.S. 309, 327, 35 S. Ct. 582, 59 L. Ed. 969, where this Honorable Court held:

> "While the Fourteenth Amendment does not require that a State shall provide for an appellate review in criminal cases (*McKane* v. *Durston*, 153 U.S. 684, 687; *Andrews* v. *Swartz*, 156 U.S. 272, 275; *Rogers* v. *Peck*, 199 U.S. 425, 435; *Reetz* v. *Michigan*, 188 U.S. 505, 508), it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the State, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the Fourteenth Amendment."

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MYER H. GLADSTONE,
Counsel for Petitioner

APPENDIX

Docket No. 34855 Agenda 3—September, 1958.

The People of the State of Illinois, Defendant in Error, *v.* Donald McIntyre, Plaintiff in Error.

Mr. Justice Bristow delivered the opinion of the court:

Donald Patrick McIntyre, referred to herein as defendant, was convicted of the crime of bookmaking in the county court of Lee County and has sued out a writ of error from this court to review the judgment of conviction.

The record shows that at the time of defendant's arrest certain articles, including racing form sheets, a parlay manual, a "hands free" telephone with a loud speaker attachment and $511 in currency were seized by the arresting officers. The officers had a search warrant purporting to authorize the search of defendant's premises. At the trial these articles were admitted in evidence over defendant's objection that the complaint for the search warrant, the warrant itself, and the search of the premises were illegal. The only question presented on this writ of error is whether the articles were properly taken and properly admitted in evidence.

Defendant argues in his brief that the verified complaint for the search warrant was insufficient as a matter of law and that therefore the warrant should not have issued. It is also argued that the warrant itself was insufficient to authorize the search of defendant's premises. In the view which we take of this case we find it unnecessary to consider the alleged deficiencies of the complaint and the warrant. It is well established that the constitutional prohibition against unlawful searches and seizures does not prevent all searches, but only those which are unreasonable. (*People* v. *Clark*, 9 Ill.2d 400.) It is likewise well established that no warrant is required where the search is an

incident to a valid arrest. (*United States* v. *Rabinowitz*, 339 U.S. 56, 94 L. ed. 653; *People* v. *La Bostrie*, 14 Ill.2d 617.) The evidence in the present case shows that one Robert Bales, a State investigator, entered a public tavern known as Lloyd's Tap and went down into the basement of the premises where he saw several persons sitting around a table with racing forms in front of them. Bales testified at the trial that he placed a $10 bet on a certain horse and McIntyre made a record of this bet on a sheet which was a part of what is commonly called the "book" in which a record is kept of all bets and all money taken in and paid out. Bales left and went back to the police station where he signed a complaint for a search warrant and procured the issuance of a warrant. The warrant was placed in the hands of the chief of police for execution. Bales went back to defendant's premises and the officer followed him shortly thereafter. When Bales returned, he placed another bet with defendant. Defendant did not have time to record this bet because the chief of police and other officers arrived while he was in the process of doing so and defendant dropped the pencil he was using. The police chief testified at the trial that he and other officers entered the defendant's premises through an open door and on his arrival he saw seven persons sitting around a table with racing forms in front of them. He saw the racing forms, scratch sheets, and some currency on the table and saw Bales in the process of placing a bet with defendant. He then confiscated the various items and arrested defendant.

A valid arrest may be made by an officer or a private person without a warrant for a criminal offense committed or attempted in his presence. The term "criminal offense" includes misdemeanors as well as felonies. (*People* v. *Clark*, 9 Ill.2d 400.) It is apparent from the testimony that when the police chief entered the premises the criminal offense

of keeping a book for the registration of bets was being committed in his presence. He therefore had a right to arrest defendant without a warrant and, having arrested him, had a right to search the immediate premises and the defendant's person and seize any evidence which was found on that search.

Since the articles in question were properly obtained as an incident to defendant's arrest it follows that they were properly admitted in evidence, regardless of whether the search warrant was in proper form. The judgment of the county court of Lee County is therefore affirmed.

Judgment affirmed.